April 28, 1997

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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RECONSIDERED REPORT AND DECISION ON APPEAL FROM NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E9601056**

CAICOS CORPORATION
Code Enforcement Appeal

Location: Redondo Seawall and Beach Road South

Appellant: David Berry, Caicos Corporation
265 Winslow Way East, #103
Bainbridge Island, WA 98110

Appellant's Representative: Deborah Parzych Lambert
W & H Pacific
PO Box C-97304
Bellevue, WA 98009-9304

SUMMARY:

Division's Preliminary:	Deny the appeal
Division's Final:	Deny the appeal
Examiner's Initial:	Appeal granted
Examiner's Reconsidered:	Appeal granted in part, denied in part

PRELIMINARY MATTERS:

Notice of appeal received by Examiner:	October 23, 1996
Statement of appeal received by Examiner:	October 23, 1996

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	November 18, 1996
Hearing Opened:	January 7, 1997
Hearing Closed:	January 22, 1997
Examiner's Initial Report:	February 3, 1997

Request for Reconsideration:	February 24, 1997
Hearing Record Administratively Re-Opened:	March 7, 1997
Request for Response:	March 7, 1997
Second Request for Response:	March 11, 1997
Hearing Record Closed:	April 10, 1997

Participants at the proceedings and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Office of the King County Hearing Examiner.

ISSUES ADDRESSED:

- Drainage
- Grading
- Shoreline management
- Sensitive areas

RECONSIDERATION:

1. Post Hearing Review. On February 3, 1997 the undersigned Examiner issued a "Report and Decision on an Appeal from Notice and Order" which granted the appeal of Caicos Corporation ("Caicos") from the October 7, 1996 notice and order served upon Caicos by the Department of Development and Environmental Services (the "Department" or "DDES"). Subsequently, on February 24, 1997 the Department requested reconsideration of that decision. On March 6, 1997 Caicos moved for dismissal of the Department's request for reconsideration. On March 11, 1997 this Examiner denied that request.

   On March 24, 1997 the Department of Fish and Wildlife filed a letter with this Examiner which addressed one of the issues contained in the Department's request for reconsideration. Subsequently, the Examiner circulated that letter to the Department and to Caicos in order for them to comment on this third party communication.

   Another attempt to enter third party evidence by the Department of Ecology on April 17, 1997 (dated April 17, 1997) was returned to the sender without review on April 21, 1997.

2. Attachments. These are the documents which have been considered in addition to the original and complete hearing record:

   A. Letter to James O'Connor, King County Hearing Examiner, requesting reconsideration, from Robert S. Derrick, Director, Department of Development and Environmental Services, dated February 24, 1997.

   B. Caicos Corporation's response to DDES' request for reconsideration, from Richard L. Lambe, dated March 20, 1997.

   C. Letter to Examiner Titus, from Bob Everitt, Regional Director, Washington State Department of Fish and Wildlife, regarding Redondo seawall and beach road, dated March 24, 1997.

   D. Letter to Examiner Titus, from Robert S. Derrick, Director, Department of Development and Environmental Services, dated April 9, 1997, responding to

Department of Fish and Wildlife letter.

E. Caicos Corporation's response to Department of Fish and Wildlife's March 24, 1997 letter, from Richard L. Lambe, dated April 10, 1997.

3. "Old Fill." The term "old fill" is used to describe that area located off-site adjacent to the south boundary of the project area, across the street from the King County Department of Transportation ("KCDOT") project office. The old fill existed long before KCDOT awarded the Redondo seawall construction to Appellant Caicos. Removal of the old fill apparently was undertaken with proper permits. Regarding the status, character and nature of changes effected by the Appellant upon the old fill, the hearing record is unclear, with only sincere argument and scant evidence offered from all sides.

A. Grading occurred within the old fill area. However, the extent of grading which occurred is unclear from the hearing record, partly because neither the Department of the Appellant has offered no specific evidence, and partly because the entire old fill has been removed under the direction of King County. Whether the foot print of the old fill was increased as a result of the grading activity which occurred remains inconclusively debated.

B. KCDOT was also cited by the appealed notice and order, according to DDES, substantially due to the alleged clearing or grading activities within the old fill area, KCDOT did not appeal. DDES holds that the SAO threshold is "zero" for grading permit requirements within a sensitive area. That is, a tablespoon of earth movement requires a grading permit for work within a designated "sensitive area." As a "shoreline of Statewide significance," the old fill was indeed located within such an area.[1]

C. In the Examiner's original decision, the old fill citation was called moot in as much as the fill has been removed. The original fill existing before KCDOT hired Caicos, and any modifications which Caicos might have performed to that old fill were both removed. DDES objects to the Examiner's use of the term "moot," citing a portion of Black's Law Dictionary Sixth Edition definition which indicates that "moot" means:

> a subject for argument; unsettled; undecided. A moot point is one not settled by judicial decisions.

Unfortunately, DDES did not cite further. The same Black's subsequently defines "moot case" at page 1008 as follows:

> Moot case. **A case is "moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy**. Leonhart v. McCormick, D.C.Pa., 395 F.Supp. 1073, 1076. Question is "moot" when it presents no actual controversy or where the issues have

[1] KCC 16.82.050 indicates that the general clearing exception for fill less than three feet in vertical depth not involving more than 100 cubic yards of earth or other material on a single site does **not** apply "if the clearing or grading is within a sensitive area" as regulated by KCC 21A.24.

> ceased to exist. Matter of Lawson's Estate, 41 Ill.App.3d 37, 353 N.E.2d 345, 347.
> **Generally, an action is considered "moot" when it no longer presents a justiciable controversy because issues involved have become academic** or dead. Sigma Chi Fraternity v. Regents of University of Colo., D.C.Colo., 258 F.Supp. 515, 523. Case in which the matter in dispute has already been resolved and hence, one not entitled to judicial intervention unless the issue is a recurring one and likely to be raised again between the parties. Super Tire Engineering Co. v. McCorkle, 416 US 115, 94 S.Ct. 1694, 40 L.Ed.2d 1. A case becomes "moot" when issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. Murphy v. Hunt, U.S.Neb., 455 U.S. 478, 102S.Ct. 1181, 1182, 71 L.Ed.2d 353. (**Emphasis added**.)

If DDES is concerned about modifications made to the beach by Appellant Caicos, then any decision made here cannot have any practical effect on the existing controversy because KCDOT has since removed the (apparently illegal) land form which Caicos is said to have modified. Would we order Caicos to put it back where it was? No.

The Dictionary of Modern Legal Usage (Garner, Oxford University Press: New York, 1987) states in part, at page 365:

> **Today, in the U.S., the predominant sense of moot is "having no practical significance," in both legal and nonlegal writing**. Bernstein and other writers have called this sense of the word incorrect, but it is now a *fait accompli*. To use *moot* in the sense "open to argument" in AmE today is to create an ambiguity, and to confuse most of one's readers. (**Emphasis added**.)

In other words, using "moot" in the manner DDES suggests creates ambiguity. The American Herigate Dictionary of the English Language, Third Edition agrees, defining the adjective "moot" in **matters of law**, thus:

> Without legal significance through having been previously decided or settled. Of no practical importance; irrelevant.

I referred to the citation regarding the modification of the old fill as "moot" because the old fill doesn't even exist any more, let alone whatever modification was at issue. That circumstance remains.

D. The hearing record is void of any evidence regarding whether the Shoreline Management Act permit requirement threshold was crossed by the alleged Caicos activities within the old fill area.

E. I reject the argument from Caicos that DDES and KCDOT are the same entity, and that KCDOT's implicit permission to modify the old fill somehow should be inter-preted as

DDES permission. They are different agencies having different sources of revenue directed toward different public purposes. Caicos contracted with KCDOT, not with DDES. Further, KCDOT never adjudicated anything. Therefore, Caicos' claim to collateral estoppel is denied.

4. Blue Clay Deposition. The February 3, 1997 Examiner's report and decision concludes that, in the case of the blue clay deposition, no violation occurred. The decision further states that, even if under higher review this conclusion should be reversed, it nonetheless must be concluded that compliance with the Department's order was "timely." For these reasons, the appeal was granted.

In its reconsideration request, the Department argues that the February 3, 1997 decision was based upon an erroneous interpretation of the words "stockpile" and "stockpiling"' and that the compliance was not "timely" because it occurred a week after the Department's oral order and, in fact, was not achieved until one day past the compliance deadline contained in the Department's notice and order. Further, the Department argues, Caicos did not immediately respond to the Department's valid oral order.

In response, Caicos argues that the debate over the definition of "stockpile" and "stockpiling" is not merely a "semantic game," but that the interpretation of language contained in permits must be base upon generally recognized dictionary definitions or the permittee will be forced to "attempt to read the mind of the permitting agency." Further, Caicos reiterates its earlier arguments that compliance "delay" was in part due to sensitivity to a greater environmental risk (the risk of collapsed bulkhead panels which would have created a worse wash-out requir-ing even more excavation into the blue clay).

A. At the close of hearing, the Examiner provided the parties opportunity to submit definitions of "stockpile" and "stockpiling" during a period of administrative continuance. The parties were encouraged to seek definitions from journals, texts, manuals or other similar publications which indicated an "industry standard" interpretation of the term. Neither side provided any such definition. Each side relied upon common dictionary definitions.

In a code enforcement matter, the Department carries a burden of proving its case. The Examiner's decision must be based upon a "preponderance of the evidence." The Department has not produced a preponderance of evidence indicating that its interpre-tation of the terms "stockpile" and "stockpiling" should prevail.

By the Department's interpretation, if I dig a posthole, then the dirt I removed from the hole in the ground is a "stockpile" until I tamp it in around the post. Caicos disagrees, citing the DDES submitted definition from Webster's new Collegiate Dictionary, which defines "stockpile" (in part) as:

> A storage pile as **a:** a reserve supply of something essential accumulated within a country for use during shortage, **b:** a gradually accumulated reserve of something (avert stockpiles of unsold cars--Bert Pierce).

The silty blue clay was not essential, was not gradually accumulated, and was not a reserve.

B. Then comes the concern regarding "timely" compliance. The Department argues that, because the Enforcement Officer is authorized to direct "either verbally (sic), in writing or through issuance of a notice and order," the Department concludes that the date of service of the notice and order is "irrelevant," in as much as adequate prior notice had been given. Although DDES correctly indicates that Code Enforcement Officers have the authority to give oral directives to citizens, DDES does not cite any code provision which gives those oral directives the weight of a written notice and order. KCC Title 23 provides an elaborate framework for the written citation, appeal, enforcement and assessment of penalties, all of which is based upon written notice and orders. In any event, Caicos set about in earnest to comply with Officer Hatch's order to remove the blue clay. Unfortunately, Caicos encountered numerous obstacles, most of which are described in finding 5B on pages four and five of the Examiner's February 3, 1997 report and decision. The Department has disputed only one of those explanations for the unfortunate delays. The Department argues that the difficult access was a reason for not depositing the blue silty clay on the beach in the first place, but is not an excuse for delay: DDES does not dispute the Appellant's explanation that restoration work was delayed while waiting for guidance from KCDOT and Washington State Department of Fish and Wildlife. The notice and order was dated October 4, 1996. It ordered removal of the excavation spoils (the silty blue clay) by October 7, 1996. Testimony that Caicos did not receive the notice and order until October 7, 1996 (the compliance deadline date!) is not disputed. The Examiner's February 3, 1997 report and decision finds that compliance was achieved the following day. DDES now disputes that finding, saying that even on October 8, 1996 excavation spoils removal work continued according to the Appellant's daily field log. However, no one in this hearing record has ever contended that work continued beyond October 8, 1996.

C. Regarding the north-end blue clay excavation, there seems to be some confusion regarding Washington State Department of Fisheries Hydraulic Project Approval ("HPA") condition numbers 17 and 18. HPA condition 17 is relevant, having to do with "silt, clay, or other fine grained soil." HPA condition 18 is not relevant, having to do with"sand, gravel. and other course excavated material." The Examiner's February 3, 1997 report and decision properly quotes HPA condition 17, but erroneously calls it "HPA paragraph 18." That Examiner's error probably explains the DDES inaccurate references to HPA condition 18 in its request for reconsideration.

What is "timely"? The Examiner's February 3, 1997 report and decision concludes that blue clay removal was "timely." The Examiner took "timely" to mean the same as the American Heritage Dictionary of the English Language, Third Edition: "occurr-ing at a suitable or opportune time; well timed." Given the constraints and obstacles with which the Appellant had to work, given the lateness of the Department's written order, given the lack of cited code authority for enforcement officer's issuing oral orders allegedly carrying $25,000 non-compliance penalties, it must be concluded here, as it was also concluded in the Examiner's February 3, 1997 report and decision, that Caicos compliance was indeed "timely."

D. Were Caicos actions egregious? The Department and Caicos agree that the deposition of blue clay occurred through a series of events that I cannot construe as wanton, willful, egregious, or intentionally non-compliant. They argue that, or do not disagree that, everyday, for weeks, the seawall panel placement trench had been excavated in

sand without any problems. On the day the trenching occurred, KCDOT and Caicos supervisors were meeting at the KCDOT project office nearby. In retro-spect, they agree that such meetings probably should not be conducted while excava-tion is going on. KCDOT had provided Caicos with project plans which identified soil types expected to be encountered. These plans did not indicate any presence of silty blue clay in the vicinity where, on that unfortunate day, it was encountered by unsupervised workers (unsupervised, remember, because the contract-ing agency had called the contractor off site for consultation during work hours). Even if I were to find that HPA condition 17 prohibited such deposition of silty clay with brutal obviousness (which is not the case), I nonetheless could not conclude that the actions of Caicos were egregious on that day. Nor, considering all of the events which then transpired, could it reasonably be concluded that Caicos was willfully non-compliant. Once again, compliance within one date of receipt of the written order must be regarded as reasonable. And, if the written order is "irrelevant" due to Code Enforcement Officer Hatch's oral directive of October 1, 1996, as DDES now argues, then why was the notice and order ever issued? It is most relevant. It is the subject of this appeal review.

5. Pumping of Silty Water. In requesting reconsideration, the Department observes that the Examiner's February 3, 1996 decision does indeed conclude that a violation occurred. The issue then becomes one of appropriate sanctions, if any. The pumping of silty water, grading permit condition 2200, requires the following:

> The erosion and sedimentation control systems depicted on this drawing are intended to be minimum requirements to meet anticipated site conditions. As construction progresses and unexpected or seasonal conditions dictate, the permittee should antici-pate that more siltation and sedimentation control facilities will be necessary to ensure complete siltation control on the proposed site. During the course of construction, it shall be the obligation and responsibility of the permittee to address any new condi-tions that may be created by his activities and to provide additional facilities over and above minimum requirements as may be needed to protect adjacent properties and water quality of the receiving drainage system.

The Department argues that this condition "specifically prohibits" the pumping of silty water onto the boat ramp or the beach. Caicos concedes that some hay bales placed to trap silty water prior to discharge had been inadvertently damaged and not replaced sufficiently soon. Then, apparently, workers on site did not respond to the Department's oral directive to cease pumping. Soon thereafter, however, supervisory personnel assured compliance. The pump-ing ceased.

According to the hearing record, the silty plume from the pumping activity extended into the water approximately 300 feet according to Officer Hatch. In his testimony, the Washington Department of Fish and Wildlife witness, John Boettner, testified that it is difficult to equate water quality to fish habitat. For that reason, he indicated that he defers to the Department of Ecology on water quality issues. The Department of Ecology decided in its order that the water quality would not suffer if siltation did not extend more than 350 feet out.

KCC 23.08.120 requires violators will not only restore damaged sensitive areas, in so far as that is possible, but will be required to pay a civil penalty for the redress of value loss or damage due to the unlawful action. In this case, the hearing record contains absolutely no evidence regarding the value of ecological, recreational, or economic values lost due to the

discharge.

6. Enforcement Cost. The hearing record is void of any information regarding the cost of enforcement incurred by the Department.

7. Findings. The Examiner's February 3, 1997 Findings are adopted as attached and incorporated here by this reference, except as may be modified or augmented by the above reconsideration.

8. Conclusions. 1 through 9 of the Examiner's February 3, 1997 Conclusions are adopted as attached and incorporated here by this reference, except as changed by the above reconsideration.

DECISION:

1. *In the case of the blue clay deposition,* no violation occurred. And, even if under higher review this conclusion should be reversed, it nonetheless must be concluded that compliance with the Department's order was diligent, deliberate and within a reasonably suitable time. With respect to those enforcement measures directed toward the removal of the blue clay, the appeal is GRANTED.

2. *With regard to the pumping of silty water,* the Appellant is responsible for failure to provide adequate siltation protection (regardless of whether hay bale damage was inadvertent). The Appeal is DENIED. Appellant Caicos is assessed civil penalty as provided in the ORDER which follows below.

3. *The historic fill modification* issue presents a moot case. The appeal is therefore GRANTED.

ORDER:

For the improper discharge of silt laden water upon the beach, Appellant Caicos is assessed $500 as provided by KCC 23.08.110. Payment shall be made not later than May 20, 1997, unless stayed by further appeal.

ORDERED this 28th day of April, 1997.

_____

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 28th day of April, 1997, to the following parties:

David Berry, Caicos Corporation
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Bainbridge Island, WA 98110

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John Boettner

Christopher Bordagaray, Caicos Corporation

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Sam Bellah, KCDOT, Road Services Division
Ken Grubbs, DDES/LUSD, Site Development Services
Luke Korpi, KCDOT, Engineering Services Section
Frank Overton, KCDOT, Road Services Division
Bob Derrick, DDES

Ken Dinsmore, DDES, Building Services Division
James Hatch, DDES/LUSD, Site Development Services
Dennis McMahon, PAO, Civil Division
Randy Sandin, DDES/LUSD, Site Development Services
Fred White, DDES/LUSD, Site Development Services

The Examiner's reconsidered decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one days of issuance of the decision.

MINUTES of the public hearing of CAICOS CONSTRUCTION, January 7 and 8, 1997.
R.S. Titus was the Hearing Examiner for this matter. Participating in the hearing were David Berry, Deborah Lambert, John Boettner, Richard Lambe, Fred White, James Hatch, Dennis McMahon, Luke Korpi, Frank Overton and Sam Bellah.

The following exhibits were offered and entered into the record:

Exhibit No. 1	Grading permit log notes
Exhibit No. 2	Caicos daily field journal excerpts
Exhibit No. 3	Notice of King County Code violation, dated 10/4/96
Exhibit No. 4	Letter from Gerald Dahl to James Hatch, dated October 9, 1996
Exhibit No. 5	Letter from John Boettner to Jeff Boone, dated October 14, 1996
Exhibit No. 6	Letter of intent to appeal from David Berry to Kenneth Dinsmore, dated October 8, 1996
Exhibit No. 7	Caicos Corporation letter of appeal, received October 29, 1996 at DDES
Exhibit No. 8	King County Zoning Adjustor's report and decision, transmitted March 22, 1996
Exhibit No. 9	Grading permit and conditions
Exhibit No. 10	Photograph log
Exhibit No. 11	Sketches of site prepared by Hatch and Caicos Corporation
Exhibit No. 12	DOE order, dated March 8, 1996
Exhibit No. 13	Resume of Deborah Lambert
Exhibit No. 14	Hydraulic project approval dated February 13, 1996
Exhibit No. 15	Daily activity reports
Exhibit No. 16	Letter from Harold McNelly to S. Michael Rodgers, dated October 24, 1996
Exhibit No. 17	Inspector's daily report, October 1, 1996
Exhibit No. 18	1992 aerial photo (reduced size)
Exhibit No. 19	Staff report

RST:var
Attachments
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ATTACHMENT A

FEBRUARY 3, 1997 FINDINGS:

1. Service. On October 7, 1996, the Department of Development and Environmental Services (the "Department") mailed a Notice and Order to Caicos Corporation (the "Appellant") by US Mail. According to the US Postal Service receipt for certified mail, the Appellant received the Notice and Order on October 8, 1996.

2. Notice and Order. The subject Notice and Order, referring KCC 16.82.060, KCC 21A.24.340 and KCC 25.32.010, cites the Appellant for the following code violations:

   A. Inadequate or no temporary or permanent erosion or sedimentation control measures;

   B. Failure to comply with grading permit No. L95G0056, Condition Nos. 0172 and 2200;

   C. Failure to comply with Shorelines Substantial Development Permit L95SH145, Conditions 1, 5, 6, 9, 14, 18, 20, 29 and 35; and,

   D. Failure to comply with Public Agency Utility Exception (PAUE) No. L95UT005, Condition Nos. 1 and 7.

   There are three areas addressed by the Notice and Order: The blue clay deposited by the Appellant on the beach within the north-end of the project site; pumping of silty water by the Appellant into Puget Sound; and, the modification of "historic fill", located at the south end of the project site. The findings below, particularly Finding Nos. 5 though 7, will be organized around these three areas.

3. Compliance Commanded. In order to achieve compliance with the citations, the Notice and Order commanded the following compliance measures:

   A. Immediately:
   - Cease pumping silt-laden water into Puget Sound, "a Class I water and water of this State"; and,
   - Implement approved erosion and sedimentation control measures.

   B. By October 7, 1996:
   - Cease all other work; and,
   - Remove excavations soils from the beach area., Southeast 250th and Southeast 251st Street.

   C. By October 9, 1996:
   - Prepare and submit a restoration plan for the "old fill" (alternatively referred to in this hearing record as the "existing fill" and "historic fill") located at the south end of the seawall.
   - "The area must be restored to its previous vertical configuration and plan footprint. Work in this area shall commence immediately upon approval of the plan by KC DDES."

4. Penalties Sought. The Notice and Order seeks to impose three categories of penalty:

   A. $500 per day for any failure to comply with the compliance schedule described in Finding No. 3, above.

   B. "An amount not to exceed $25,000, that is reasonably based upon the nature and gravity of the violation and the cost to the County of enforcing this Chapter against the violator. KCC 23.08.120. In its final recommendation to the Examiner, the Department, rather than recommending "an amount not to exceed $25,000", recommended a fine precisely in that amount.

   C. $1,000 penalty for violation of Shoreline Management regulations pursuant to KCC 25.32.120.

5. North-End Blue Clay Excavation. The Notice and Order cites permit conditions which, in turn, refer to Washington State Department of Fisheries Hydraulic Project Approval Conditions. HPA Paragraph 18 requires:

   > Excavated materials containing silt, clay or other fine grained material shall not be stockpiled below the ordinary high water line (OHWL).

Unfortunately, the Appellant and the Department do not agree upon the definition of "stockpiled." This distinction comes to issue because during beach excavation pursuant to contract (in order to install seawall components or panels) the Appellant (a contractor hired by King County Department of Public Works to construct a seawall and other improvements at Redondo Beach consistent with specified drawings and contracts), encountered "blue clay, naturally occurring and hidden below the sandy beach surface." Continuing the construction methodology which previously had satisfied their employer, the Department of Public Works and inspectors, the Caicos employees placed the excavated blue clay upon the beach. The principal officer of the Appellant, responsible for construction operations on this jobsite was not available because he was participating in a meeting which had been called by the Department of Public Works.

The Department and the Appellant now disagree not only with respect to whether controls in effect at the time prohibited this placement of silty blue clay upon the beach; but, also, whether compliance/remedial action taken by the Appellant was timely. The following findings apply:

A. Was the silty clay "stockpiled"?

The debate regarding whether the excavated blue clay was permitted to be placed upon the beach centers around a definitional debate over the meaning of the word "stockpiled" as used in HPA ¶18" quoted above. Both the Appellant and the Department seek to bolster their positions by relying upon various definitions of the term "stockpile." Definitions cited by each of the parties contain definitional elements which refer to "storage", "a reserve supply" of something", "a gradually accumulated reserve" of something, "a reserve of something essential" or "something held to resemble such a stockpile". These definitions are contained in the post-hearing arguments and submittals filed with the Examiner by each party.

B. Was remediation timely?

This issue is also related to the question of whether the actions of the Appellant were "egregious" as asserted by the Department. Review of this issue concerns two different series of events: Those which occurred prior to the October 8, 1996, effective date of the Notice and Order and those which occurred following that date.

The deposition of blue clay upon the beach was discovered the same day it occurred simultaneously by the responsible officer of the Appellant corporation and the Department of Public Works, then shortly thereafter by the Department, September 26, 1996. The Appellant began restoration work on that same day. However, the Appellant's unrebutted testimony shows that several obstructions to timely restoration occurred:

- The narrow one-lane road that provided access to the project's site prohibited simultaneous operations requiring truck access. Removal of the blue clay required dump truck access to haul the clay away. At the same time, stabilization of installed concrete panels which made up the seawall under construction also required access for concrete trucks. Without stabilization of those panels, the probable environmental damage could rapidly increase.

- "For a couple of days" the Appellant chose to emphasize panel stabilization because of the substantial risk that the panels would wash out if not stabilized. Such a washout would require still more excavation into the unwanted blue clay.

- On September 27 and 28 truckers hired by the Appellant apparently conducted a work stoppage, refusing to haul the blue clay.

- The Appellant's restoration work was delayed by tides. Only during limited times was the tide low enough to provide the Appellant access to the beach.

- In addition, for a period, restoration work was delayed while the Appellant awaited guidance from the Department of Public Works and from the Washington Department of Fish and Wildlife. The Appellant contends that it could not complete the restoration work until these agencies chose the restoration they wanted.

With respect to the disagreement over whether the Appellant complied with the compliance schedule contained in the October 7 Notice and Order, the hearing record indicates that the north-end blue clay was

removed completely by October 8, 1996, on the date of receipt of the Notice and Order.

6. Pumping Of Silty Water. A second issue area concerns the Appellant's pumped discharge of silty water onto the beach. According to the King County Department of Transportation "Inspector's Daily Report" (Exhibit No. 17), "Pumping silt directly into Puget Sound, contractor turned off the pumps upon request." This notation contradicts departmental testimony which suggests that employees of the Appellant did not immediately respond to a request to turn off the pump, but instead, indicated that they would wait until they had consulted their project supervisor. The Appellant argues that the "brief pumping" of silty water on October 1, 1996, did not damage the beach because the water flowed down the concrete boat ramp directly into Puget Sound; and, that the discharge did not violate any applicable requirement.

7. "Historic"/Old Fill Modification. The "historic" fill located at the south end of the project site existed prior to this project. The fill, at one time, had been located below the natural OHWL, thereby creating a new OHWL. The Appellant used the fill area as a large rock storage area for approximately two months. This area is located across the street, and observable, from the Department of Public Works Project Office. The Appellant contends that the Department of Public Works never objected to the use of the historic fill area during that period. Nor does the appealed Notice and Order cite the Appellant for any rock pile stockpile on the historic fill.

   Cleaning up that storage area, apparently at the direction of the Department of Public Works, the Appellant conducted some sort of modification of the historic fill. The hearing record does not clearly indicate the complete nature or character of that modification. The Appellant testifies that it did not increase the size of the fill, but merely attempted to return it to its original contours; and, that it did this work in good faith at the direction of the Department of Public Works. The regrading that occurred apparently was never contemplated or approved by any of the permitting agencies having jurisdiction. Nor was it a bid item in the project contract. The record suggests, however, that staging areas are not typically included in public agency project contracts and plans. Although the Department argues that regrading of the old fill is a violation of KCC 16.82 (clearing and grading code), the record contains no specific evidence regarding whether the work conducted by the Appellant actually meets the KCC definitional standard for "grading".

   Did the "old fill" work violate KCC 21A.24 (sensitive areas) controls? The work occurred within the definitional buffer area of the shoreline. In addition, the work occurred within an area subject to KCC 25.32 (shoreline management) jurisdiction.

ATTACHMENT B

FEBRUARY 3, 1997 CONCLUSIONS:

North-End Blue Clay Excavation.

1. The Appellant argues that the Department of Public Works failed to disclose the presence of blue clay within the north end project area. This is a contractual issue to be resolved in another forum, not a code enforcement issue.

2. The blue clay was not "stockpiled" in the common meaning of the term. If a permittee cannot "put" any amount on the beach at any time, then a verb other than "stockpile" should be used. For instance, the condition could say "Do not PUT" any excavated materials containing silt, clay or other fine grained material below the OHWL." But, that is not what the HPA ¶18 said.

3. Considering the preponderance of evidence (see, particularly, Finding No. 5, above), it is concluded that, with respect to the blue clay deposition, the Appellant exercised reasonable and due diligence in removing the material from the beach. The limitations and hardships faced by the Appellant were significant, yet timely compliance with the Notice and Order was achieved. It is, after all, the Notice and Order which has been appealed, not some earlier oral directive. Even considering the earlier oral directives on September 26, 1997, it is concluded that the Appellant took the compliance issues seriously and moved forward responsibly toward timely removal of the blue clay.

Pumping Of Silty Water.

4. The debate over water quality impacts, such as the waterward extension of the silty plume, concerns not whether State water quality standards were violated, but rather, whether ordinances or permit conditions were violated. State water quality standards are not addressed here.

5. Unquestionably, a violation occurred, principally due to inadvertent damage to protective hay bales used to control the silty discharge. However, the Appellant's environmental compliance consultant, Deborah Lambert, correctly observed that such violations typically are not assessed civil penalties if promptly resolved. It has been the overriding purpose and philosophy of code enforcement in King County, for quite a number of years, that the dominant concern will be the correction of violations, not the collection of penalty assessments. Correction occurred timely and there is no evidence of damage to the beach resulting from the pumping activity.

Historic Fill Modification.

6. The hearing record provides no evidence regarding the threshold test for determining whether a substantial development permit should have been obtained prior to the "old fill" modifications undertaken by the Appellant. See WAC 173-14-040.

7. The Appellant and the Department disagree regarding the extent and nature of the modifications to the old fill area. However, neither has offered the hearing record detailed information regarding the specific modifications undertaken; and neither has provided a clear, distinct and specific "before and after" comparison. Thus, it is difficult to determine the extent of work undertaken. See Condition 6., preceding.

7. The "old fill" clearly abuts a designated sensitive area identified in the King County Sensitive Areas Map Folio. At the very least, the proposed grading and clearing intentions should have been submitted to the Department for review prior to action. They were not.

8. Nonetheless, events have transpired since the code enforcement action which substantially leave this issue moot. The "old fill" isn't there anymore---through actions caused by agencies of King County. One wonders whether appropriate shoreline management review occurred prior to removal of the old fill. Fortunately, that is not a subject of the instant review.

Egregiousness.

9. Regarding the argued "egregiousness" of Appellant action or alleged inaction, the evidence of record strongly suggests that the County and the Appellant have together experienced what may be called "enmeshment of personalities," not egregious conduct. This Appellant has extensive marine construction experience and has no history of penalties, which further suggests that these circumstances are unusual and were fed by unpredictable

circumstances which complicated the relationships among the Appellant, the Department and the Department of Public Works. Such circumstances do not call for the exceptional penalty sought by the Department, which should be denied.

Further, given the circumstances in this case (Notice and Order mailed October 7; received October 8; Notice and Order requires October 7 compliance; it cannot be concluded that the Appellant received timely notice.